

and he invited us to decide the question asked by this Reference accordingly.

Mr. Ramani, on behalf of the respondent, submitted, *inter alia*, that it was not open to the appellant to impeach the correctness of the decision in *Tan Shu En and Another v. Public Prosecutor*, and that "to give the natural and ordinary meaning to the words 'police officer' would create absurdities".

The judgment in *Tan Shu En and Another v. Public Prosecutor* is not the decision of a Court of co-ordinate jurisdiction with the Court of Appeal, and although the Court of Appeal would always give great weight to such a decision, it is not binding upon it. We prefer the reasoning in the case of *Rex v. Man Woo*.

In our view, the words 'police officer' in section 26 of the Evidence Ordinance must be given their ordinary every-day meaning. Applying that test, a Chandu Officer is not, in our opinion, a police officer within the meaning of the section.

It was also argued on behalf of the appellant that a Chandu Officer is expressly excluded from the scope of section 26 of the Evidence Ordinance by reason of the definition of 'police officer' in section 2 of the Interpretation and General Clauses Ordinance, 1948, which reads as follows:—

"'police officer' means any member of the police force of the Federation;"

Our decision on the first submission was reached independently of the question as to whether or not the definition of 'police officer' in the Interpretation and General Clauses Ordinance excludes a Chandu Officer from the scope of that section, but we are of the opinion that it does.

At the commencement of his argument before us, the Solicitor General indicated that the Public Prosecutor did "not wish to press hardly on the respondent", and that the sole purpose of this Reference was to obtain a decision on a point of law which it was considered to be in the public interest to have determined by this Court. That being so, we make no order on this Reference, and the order made by Wilson, J. will, therefore, stand.*

Order accordingly.

In re ZAINAB BINTE MAT DIAH, Decd.

[App. Civ. Juris. (Briggs, J.) June 21, 1951]

[Kota Bharu — Civil Appeal No. 1 of 1951]

Letters of Administration — Grant of — Two Estates in one Proceedings — No proper representation — Distribution order.

To wind up two estates in the proceedings on a single petition is wholly improper and must never be done. Any arguments from supposed economy or convenience must be disregarded. The rule that each estate must be dealt with separately is without exception.

APPEAL from the decision of the Assistant Registrar.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Briggs, J.:—This matter came before me on appeal from the Assistant Registrar, Kota Bharu, and raises certain points which I think require to be understood more clearly than they are at present. I accordingly direct that, although this judgment is given in Chambers, it is to be communicated to all District Officers and Assistant District Officers in the State, and that it may be reported if desired.

Zainab binti mat Diah died some eight years ago leaving as her *waris*, in accordance with Mohammedan law, two sons, Taib and Hassan. After the death of Zainab and before the petition was filed, Hassan died leaving as his *waris*, in accordance with Mohammedan law, four minor children, three sons and one daughter, and a widow, Minah. There has been no application for representation of the estate of Hassan. Taib petitioned for Letters of Administration of the estate of Zainab and Minah was cited in order that she might represent the estate of Hassan. On the hearing of the petition, the parties requested the Assistant Registrar to make an immediate distribution order, and he did so. The order purports to have been made by consent, but in the case of appeals from a Registrar to the Judge in Chambers this does not bar appeal, since the Registrar is notionally exercising the Judge's discretion, and the matter, if it comes before the Judge, does so as *res integra*. I think the only exception to this rule is where the Registrar is acting as taxing master. I am of opinion that the Order of the Assistant Registrar was wrong for the following reasons.

Minah cannot, in the present state of affairs, represent the estate of Hassan: nor can anyone else. Neither Minah nor her children are beneficiaries of the estate of Zainab, except in the loose sense that they may ultimately, through the estate of Hassan, receive some of its assets. There was, accordingly, no person who could properly appear as a respondent on the petition, although there was an interested "party". It is not necessary in these circumstances, I think, to complicate proceedings by appointing an administrator *ad litem* to the estate of Hassan; but in the absence of a proper representative of his estate it is quite impossible to make any distribution order, and the only proper order would be to make a grant of Letters

* The judgment of Wilson, J. is reported in (1951) M.L.J. at p. 111.

of Administration to Taib, subject to the usual security for the purpose of protecting the interests of the estate of Hassan.

In this case, the only asset was a small piece of land and there were debts. It was therefore proper to give leave to sell the land on extraction of the grant of Letters of Administration, on terms that the proceeds should be paid into Court, but nothing further than that could be done. It is quite impossible at this stage to know whether there are or are not any creditors of the estate of Hassan. It may well be that they would absorb the whole amount of his share in Zainab's estate and that his beneficiaries will, in fact, receive nothing. There is no machinery for ascertaining the facts in these proceedings and this alone is a sufficient reason why his estate must be the subject of separate proceedings.

To wind up two estates in the proceedings on a single petition is wholly improper and must never be done. It is true that, if the estates are small enough, revenue may not be affected, but except in the case of very small estates this also is an additional reason against the course attempted here. Where in the winding up of one estate it appears that the estate of another deceased person is a beneficiary, nothing can be done to dispose of that share until proper proceedings are taken for representation or distribution of the second estate. The difference between the positions of Zainab's creditors and Hassan's creditors in this case arises from the fact that public advertisement has been given of the intention to take proceedings to wind up Zainab's estate, but no notice has been given of any intention to wind up Hassan's estate, and accordingly his creditors have received no warning that, unless they are active, their rights may be over-ridden. This is obviously contrary to principle. Any arguments from supposed economy or convenience must be disregarded in this matter. The rule that each estate must be dealt with separately is without exception and all Assistant Registrars and Deputy Registrars must act accordingly.

Order accordingly.

P. MOHAMED v. AMINAH d/o VEERAROW.

[Orig. Civ. Juris. (Wilson, J.) June 22, 1951]

[K.L. — Civil Suit No. 354 of 1950]

Guardianship of Infants — Muslim Children — Custody of — Discretion of Court.

If it cannot be ascertained to which sect a child belongs to and although the father is a natural guardian

of his children, the question of guardianship must depend on the consideration what is best for the child as a Moslem child.

Case referred to :—

(1) *Abdul Aziz Khan v. Nanhe Khan* (1927)
I.L.R. All. 332.

CIVIL SUIT.

M. N. Cumarasami for the plaintiff.

P. P. Nair for the defendant.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Wilson, J. : — The plaintiff and the defendant were married in 1936 in accordance with Mahommedan rites. There are four children of the marriage and their ages now range from 6 to 13 years. Three of the children are girls and one is a boy. Some few months before the end of the Japanese occupation the plaintiff and the defendant separated and the defendant went with three children to live with her mother. According to the plaintiff he was at the time ill, suffering from typhoid and unconscious and he wishes me to believe that his wife deserted him when he was in that condition. According to the defendant she and three of the children were ill and the plaintiff asked her to go and stay with her mother and gave her \$25, and took them on a bus. The reason alleged is that the plaintiff was unable to look after these sick persons carefully. The defendant denies that the plaintiff was ill. In so far as it may be material to this case I prefer the evidence of the defendant as to the reason for the separation. After going to live with her mother the defendant gave birth to the fourth child. In the year 1946 the plaintiff divorced the defendant and in 1949 defendant married a man called Mohamoo with whom she is now living. The plaintiff claims custody of the four children who are, in fact, now living with the defendant's mother and not with the defendant.

It may well be that in these circumstances the children are not now in the custody of the defendant in which case she cannot be ordered to hand over the children to the plaintiff and this action would fail for that reason. However that may be, I have considered this case on the basis that the defendant still has legal custody of all four children. In the case of *Abdul Aziz Khan v. Nanhe Khan*⁽¹⁾ it was held that a father is not only the natural guardian, but has an inalienable right to the custody of his minor son, unless there are overwhelming circumstances to the contrary. That